TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

INTEREST OF THE AMICUS CURIAE

Professional lawn care is a $1.9 billion industry which serves nearly 10 million customers annually. The Professional Lawn Care Association of America ("PLCAA") is an association of 1,350 entities that offer lawn care services. PLCAA members range from national companies, such as Chemlawn Services Corp. and TruGreen Corp., to small local businesses, which provide services including application of fertilizers and weed, insect, and disease control materials, collectively known as pesticides.

The PLCAA has previously litigated the question of preemption of local ordinances by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), *see Professional Lawn Care Ass'n v. Milford*, 909 F.2d 929 (6th Cir. 1990), *petition for writ of cert. pending*, No. 90-382, and it submits this brief in support of respondents and in support of the ruling by the Sixth Circuit that FIFRA preempts *all* local regulation of pesticide use. *See Professional Lawn Care Ass'n v. Milford, supra.*[1]

THE LIKELY IMPACT OF LOCAL REGULATION OF PESTICIDES

There are approximately 83,000 units of local government in the United States. Petitioners contend that each of those units should be permitted to enact and enforce regulations governing pesticide use, without regard to the regulations already enacted and enforced at the federal and state levels.

In considering the 1972 amendments to FIFRA at issue in this case, Congress clearly foresaw that local regulation of pesticide use would be inconsistent, burdensome, and unwarranted. *See* discussion *infra* at pp. 24-27. Reference to existing local ordinances demonstrates, without exaggeration, the detrimental impact on an entire industry

[1] Written consents to the filing of this *amicus* brief, among others, have been obtained from all parties and filed with the Court.

which will result from unrestrained local regulation of pesticide use.

A. The Potential for Non-Uniform Local Regulation

Local pesticide use ordinances have taken sharply different forms. The Casey ordinance mandates that a permit be obtained before pesticides may be applied and requires that placards be posted on property before application and be maintained for six months; violations are subject to forfeiture of up to $5,000. Pet. App. II C6-16. Other ordinances require registration, pre-application notice and post-application posting of placards. *Professional Lawn Care Ass'n v. Milford*, 909 F.2d 929 (6th Cir. 1990); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987). One ordinance has prohibited certain applications, *People, ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984); another prohibits "any commercial spraying of herbicides for non-agricultural uses unless this spraying is first approved by a Town Meeting vote." *Central Maine Power Co. v. Lebanon*, 571 A.2d 1189, 1190-91 (Me. 1990).

Even ordinances which have the same purpose can impose different requirements. For example, the posting provisions of the Casey ordinance require the placard to state "WARNING—AREA TREATED WITH PESTICIDE" in one-inch block letters. *See* Pet. App. II C14. The posting provisions of the *Milford* ordinance, on the other hand, require placards to state "Chemically Treated Lawn—Keep Children and Pets Off for 72 Hours." 909 F.2d at 930.

The threat of non-uniformity is especially great in urban areas, where applicators would be subject to numerous different local ordinances. The Chicago area, which encompasses about 270 units of local government, is illustrative. Within a 30-mile radius, six local governments have recently enacted ordinances regulating pesticide use in dramatically different ways.

Two Chicago-area ordinances prohibit "custom application of pesticides," require commercial applicators to obtain a license and file a $5,000 performance bond before applying non-pesticide substances, and impose $100 to $500 fines for violations. City of Highland Park Code of Ordinances, ch. 99; Village of Lincolnshire Ordinances § 4-2B-1 *et seq.* Another ordinance adopts the Illinois Lawn Care Products Application and Notice Act and imposes $50 and $100 fines for violations. Hoffman Estates Municipal Code § 6-2-1-HE-16-103-A, B.

In Aurora, Illinois, commercial applicators must obtain a license, provide specified information to customers, give written notice to certain adjoining property owners, and place 4″ by 5″ placards on treated property. Placards must be white with dark lettering, state "LAWN CARE APPLICATION—STAY OFF GRASS UNTIL DRY—FOR MORE INFORMATION CONTACT:" in block letters at least $^3/_8$ inch tall, and be rain resistant for two days. One placard must be posted for each 75 feet of frontage of the property. *See* City of Aurora Ordinance No. 090-59, § 21-32 *et seq.*

The Village of Schaumburg also requires licenses, and when outdoor applications are made, certain information must be given to the property owner and placards must be posted for at least 24 hours after the application. The placards must be 4″ by 5″ and rain resistant for 24 hours, and must identify the date of the application and state "Please Stay Off the Grass Until Dry." Violations are punishable by fines up to $500. *See* Schaumburg Village Code §§ 16-5 *et seq.*

Finally, in the Village of Oak Park commercial applicators must obtain licenses and maintain an outdoor applications log stating the applicator's name and telephone number, the date and location of the treatment, and the name of the pesticide applied, along with its "concentration of active ingredients." Placards must be left on treated property for 72 hours, with one placard posted for each 100 feet of frontage. Placards must be yellow with black lettering, must be between 4″ by 4″ and 6″ by 6″ in size and rain resistant for 72 hours, and must state "PLEASE

STAY OFF" in one-inch block letters and "PESTICIDES APPLIED" in three-quarter-inch block letters. Violations are punishable by fines of up to $500. *See* Oak Park Village Code § 20-10-1 *et seq.*[2]

In short, local ordinances have imposed a variety of license and permit criteria, prohibitions, posting and notice requirements, and penalties. These ordinances reflect the lack of uniformity which would occur, on a national basis, if local regulation of pesticide use were permitted.

B. The Potential Cost of Local Regulation

The likely cost of local regulation is considerable—for most companies, prohibitive.[3] That cost arises from three common provisions of local ordinances: permit or license fees; posting and notice requirements; and penalties. Moreover, the cost would be borne by national companies and local companies alike, and undoubtedly would be passed on, at least in part, to consumers.

1. Permit, License, and Registration Costs

The Casey ordinance aptly demonstrates permit and licensing costs. An applicant for a permit must submit a $25 processing fee. Pet. App. II, C14. A permit applies only to treatment of a "single defined area" within the town, so that different permits must be obtained for each contemplated application. *Id.*, C7. Furthermore, if a customer requires multiple treatments. which would extend over more than 60 days, multiple permits must be obtained. *Id.* As such, any commercial applicator seeking to serve multiple customers in Casey whose properties are

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[2] The Aurora, Schaumburg, and Oak Park ordinances are set forth in the Statutory Compilation submitted by *amici* Village of Milford, *et al.*, at 32-41, 44-58.

[3] According to *Lawn Care Industry*'s 1989 State of the Industry Report, only seven percent of professional lawn care firms had revenues of more than $1 million in 1988. Eighty-three percent of such firms had revenues of less than $500,000 in 1988, and 31 percent had revenues of less than $100,000.

covered by the ordinance would likely have to pay multiple processing fees.

In addition, applicants must provide voluminous information, such as an inventory of pesticides to be used, a statement of why a pesticide application is preferable to alternative methods of treatment, and discussion of the status of pesticides to be applied and any chemical alternatives. *See* Pet. App. II, C7-11. The costs of compliance with these requirements will be extensive.

Projected on a national basis, license costs alone could amount to millions of dollars. If half of the 83,000 units of local government enacted ordinances requiring a $25 fee, and four applicators per unit paid such fees, that cost alone would exceed $4 million annually.

2. Posting and Notice Requirements

Compliance with posting and notice requirements, too, will involve significant costs. Such requirements variously obligate companies to obtain special placards, to post such placards before and after treatments, and to monitor such placards to ensure that they remain on the property for specified periods. The requirements do not permit any "economies of scale," since different ordinances require differently worded placards of different sizes and colors.

The circumstance of Chemlawn, which provides lawn care services to 1.3 million customers, illustrates the potential cost. If Chemlawn were required to post one placard on the property of each of its customers, for each of its five annual applications, Chemlawn would have to purchase more than *6 million* specially sized, colored, worded, and laminated placards. That amount would be multiplied if, as some ordinances mandate, more than one placard must be posted on treated property. On an industry-wide basis, local posting regulations could require the purchase of tens of millions of placards annually.

The costs of complying with notice requirements and the costs of monitoring placards are more difficult to estimate but are no less real. Oral and written notice, and

monitoring of placards, will require significant employee time and expense.

3. Penalty Costs

Penalties for non-compliance with local ordinances range from $50 per violation to the draconian $5,000 forfeiture provision included in the Casey ordinance. If local ordinances are sanctioned by this Court, it is reasonable to assume that even companies attempting to diligently comply with a patch-work of regulations may run afoul of the minutiae contained in local ordinances. If only half of the 83,000 units of local government enacted ordinances, and such units each levied only $500 in fines each year, the cost would amount to $20 million.

C. The Potential for Duplicative Regulation

Local pesticide ordinances clearly may result in duplicative regulation. Many states, pursuant to FIFRA, have enacted posting and notice regulations. *See New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989) (discussing New York state statute). Such regulations also have been enacted by counties, *see Maryland Pest Control Ass'n v. Montgomery County, supra*, by cities, *see COPARR, Ltd. v. Boulder*, 735 F. Supp. 363 (D. Colo. 1989), by towns such as Casey, and by villages, *see Professional Lawn Care Ass'n v. Milford, supra*.

It is not unlikely that, if local regulation is permitted, independent posting and notice regulations could be imposed at the state, county, and city, township, or village levels.[4] Applicators could be required to post multiple differently sized, colored, and worded signs, and to provide notice in different forms and of different scope, for each

[4] The briefs of petitioners and supporting amici display disdain for the regulatory abilities of the states, and thus indicate that local governments would seek to impose their own posting and notice ordinances notwithstanding state regulation of the same area. *See* Pet. Br., at 69; NIMLO Br., at 5; Br. of Conservation Law Foundation, *et al.*, at 33-35.

application to a single parcel of property. The potential for duplicative regulation is obvious.

I. SUMMARY OF ARGUMENT

FIFRA creates a comprehensive framework for the regulation of pesticides. To ensure adequate regulation, while avoiding unnecessary and burdensome additional regulation, Congress deliberately confined regulatory authority over pesticide use to the federal government and the states, and denied such authority to local governments. The language and structure of FIFRA make it clear that Congress sought to preclude local regulation of pesticide use, and the statute's legislative history confirms Congress' preemptive intent. As such, this Court should rule that FIFRA preempts *all* local regulation of pesticide use.

II. ARGUMENT

A. The Regulatory Scheme Created By FIFRA Comprehensively Regulates Pesticide Use

FIFRA was enacted in 1947 to "replace and expand the protection" afforded by the Insecticide Act of 1910, which was deemed "inadequate" due to development and use of new pest control products. *See* H.R. Rep. No. 313, 80th Cong., 2d Sess., *reprinted in* 1947 U.S. Code Cong. Serv. 1200-01. However, "[a]s first enacted, FIFRA was primarily a licensing and labeling statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

In 1972, Congress enacted amendments designed to "completely revise[ ]" FIFRA. S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. This Court summarized the history and effect of the amendments as follows:

> Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, . . . Congress undertook a comprehen-

> sive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972 . . . . *The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute* . . . . As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority. (emphasis added)

Ruckelshaus v. Monsanto Co., 467 U.S. at 991-92. *See* H.R. Rep. No. 511, 92d Cong., 1st Sess. at 1 (1971) (amendments intended "to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides.").

The 1972 amendments achieved FIFRA's transformation into a "comprehensive regulatory statute" by, *inter alia*, adding "a number of innovations to direct and strengthen federal control over pesticides." *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1165 (D.C. Cir. 1975). FIFRA now affords the Environmental Protection Agency ("EPA") far-reaching regulatory and supervisory authority over the use of pesticides and analogous chemical substances, *see* 7 U.S.C. § 136 *et seq.*,and the EPA has promulgated extensive regulations in furtherance of this authority. *See* 40 C.F.R. §§ 152-173 (1988).

The EPA interprets its duty to regulate pesticide "use" broadly. In July 1988, for example, the EPA proposed changes to its regulations governing worker protection from agricultural pesticides. *See* 53 Fed. Reg. 25970 (1988) (to be codified at 40 C.F.R. §§ 156 and 170). The proposed regulation specifies when notification is required, whether the warning must be oral or posted, and what language or symbols the warning must contain. In the proposed regulation, the EPA defines "use" as follows:

> The regulation incorporates a definition of "use" which covers numerous activities in addition to application of pesticides, all of which the Agency has determined are necessary steps to assure the safe use of pesticides and the prevention of unreasonable adverse effects on workers [§ 170.9(a)]. These activities occur prior to application, during application, and after application. This definition of "use" includes, but is not limited to, application, allowing or arranging for application, making necessary preparations for application, supervising application, and taking any required post-application actions.

53 Fed. Reg. at 25979.

Under the FIFRA scheme the broad regulatory authority of the federal government does not stand alone. Rather, FIFRA expressly contemplates and authorizes additional regulation at the state level. The statute states:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

FIFRA's authorization of state regulation of "sale or use" of pesticides confers extensive powers upon states, which they have fully exercised. States have enacted numerous statutes regulating pesticides and pesticide applicators,[5] as well as extensive administrative regulations governing pesticide use.

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[5] Ala. Code § 2-27-1 *et seq.* (1990); Alaska Stat. § 46.03.320 (1990); Ariz. Rev. Stat. Ann. § 3-341 *et seq.* (1989); *id.* § 3-361 *et seq.*; *id.* § 32-2301 *et seq.*; Ark. Stat. Ann. § 2-16-401, *et seq.* (1990); *id.* § 17-30-101 *et seq.*; *id.* § 20-20-201 *et seq.*.; Cal. Bus. & Prof. Code § 8500, *et seq.* (Deering 1991); Cal. Food & Agric. Code § 11401, *et seq.* (Deering 1990); *id.* § 12751 *et seq.*; *id.* 13141 *et seq.*; *id.* § 14001 *et seq.*; *id.* § 15201 *et*

As of August, 1989, 49 states had EPA-approved pesticide applicator certification programs and 48 states had entered into cooperative enforcement programs. In 1988, 992,920 private applicators and 295,798 commercial applicators were certified to use or supervise the use of restricted use pesticides in the United States, four territories and 11 Indian tribes. In 1990, the total cost of state en-

seq.; Colo. Rev. Stat. § 35-9-101 *et seq.* (1990); *id.* § 35-10-101 *et seq.*; Conn. Gen. Stat. § 22a-46 *et seq.* (1989); Del. Code Ann. tit. 3, § 1201 *et seq.* (1990); Fla. Stat. § 482.011 *et seq.* (1989); *id.* § 487.011 *et seq.*; Ga. Code Ann. § 2-7-50 *et seq.* (1990); *id.* § 2-7-90 *et seq.*; *id.* § 43-45-1 *et seq.*; Haw. Rev. Stat. § 149A-2 *et seq.* (1990); *id.* § 460J-1 *et seq.*; Idaho Code § 22-3401 *et seq.* (1990); Ill. Rev. Stat. ch. 5, para. 801 *et seq.* (1988); *id.* ch. 11 ½, para. 2201 *et seq.*; Ind. Code. Ann. § 15-3-3.5-1 *et seq.* (Burns 1990); *id.* § 15-5-3.6-1 *et seq.*; Iowa Code § 206.1 *et seq.* (1989); Kan. Stat. Ann. § 2-2438 *et seq.* (1989); *id.* § 2-2348a *et seq.*; Ky. Rev. Stat. Ann. § 217.541 *et seq.* (Baldwin 1991); *id.* § 217B.010 *et seq.*; La. Rev. Stat. Ann. § 3:3201 *et seq.* (West 1990); Me. Rev. Stat. Ann. tit. 7, § 601 *et seq.* (1989); *id.* tit. 22, § 1471A *et seq.*; Md. Agric. Code Ann. § 5-101 *et seq.* (1989); *id.* § 5-201 *et seq.*; Mass. Ann. Laws ch. 132B, § 1 *et seq.* (Law. Co-op 1990); Mich. Comp. Laws § 286.551 *et seq.* (1990); Minn. Stat. § 18B.01 *et seq.* (1990); Miss. Code Ann. § 69-23-1 *et seq.* (1990); *id.* § 69-23-101 *et seq.*; Mo. Rev. Stat. § 263.269 *et seq.* (1989); *id.* § 281.101 *et seq.*; Mont. Code Ann. § 80-8-101 *et seq.* (1989); Neb. Rev. Stat. § 2-2601 *et seq.* (1989); Nev. Rev. Stat. § 555.2605 *et seq.* (1989); *id.* § 586.010 *et seq.*; N.H. Rev. Stat. Ann. § 430:28 *et seq.* (1989); N.J. Rev. Stat. § 13:1F-1 *et seq.* (1989); N.M. Stat. Ann. § 76-4-1 *et seq.* (1990); N.Y. Envtl. Conserv. Law § 33-0101 *et seq.* (Consol. 1991); N.Y. Pub. Health Law § 1601 *et seq.* (Consol. 1991); N.C. Gen. Stat. § 143-434 *et seq.* (1990); *id.* § 106-65.22 *et seq.*; N.D. Cent. Code § 4-35-01 *et seq.* (1989); *id.* § 19-18-01 *et seq.*; Ohio Rev. Code Ann. § 921.01, *et seq.* (Baldwin 1990); Okla. Stat. tit. 2, § 3-61 *et seq.* (1989); *id.* tit. 2, § 3-81 *et seq.*; Or. Rev. Stat. § 634.006 *et seq.* (1989); 3 Pa. Cons. Stat. § 111.21 *et seq.* (1989); R.I. Gen. Laws § 23-25-1 *et seq.* (1989); S.C. Code Ann. § 46-13-10 *et seq.* (Law. Co-op. 1990); S.D. Codified Laws Ann. § 38-20A-1 *et seq.* (1990); *id.* § 38-21-14 *et seq.*; Tenn. Code Ann. § 43-8-101 *et seq.* (1990); *id.* § 62-21-101 *et seq.*; Tex. Agric. Code Ann. § 76.001 *et seq.* (Vernon 1989); *id.* § 135b-6; Utah Code Ann. § 4-14-1 *et seq.* (1990); Vt. Stat. Ann. tit. 6 § 911, *et seq.* (1989); *id.* tit. 6, § 1101 *et seq.*; Va. Code Ann. § 3.1-249.27 *et seq.* (1990); Wash. Rev. Code § 15.58.010 *et seq.* (1990); *id.* § 17.21.010 *et seq.*; W. Va. Code § 19-16A-1 *et seq.* (1990); Wis. Stat. § 9467 *et seq.* (1988); Wyo. Stat. § 35-7-350 *et seq.* (1990).

forcement, certification, and training programs was projected to reach more than $29.5 million.[6]

Moreover, 15 states recently have enacted statutes or issued regulations requiring, on a state-wide basis, varying forms of notice and posting in connection with pesticide applications.[7] This type of regulation, too, is within the states' authority under FIFRA. *See New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d at 116-17.

In short, FIFRA establishes a federal-state partnership which extensively regulates pesticide use at two levels. FIFRA thus has created "an elaborate framework for the regulation of pesticide use in the United States." *Love v. Thomas*, 838 F.2d 1059, 1061 (9th Cir.), *amended*, 858 F.2d 1347 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989).

Amici argue that posting and notice ordinances constitute "public notice" regulation which is outside the purview of FIFRA. Br. of Village of Milford, *et al.*, at 2. This argument has been rejected by lower courts, *see Professional Lawn Care Ass'n v. Milford*, 909 F.2d at 932, and should be rejected by this Court as well. The comprehensive scope of FIFRA is such that the types of regulation attempted by Casey and other local governments can be,

[6] *See* Association of American Pesticide Control Officials, *Financial Survey of the Cooperative EPA and State Pesticide Regulatory and Educational Programs* (August 1989).

[7] *See* Colo. Rev. Stat. § 35-10-101 *et seq.* (1991); Conn. Gen. Stat. § 22a-66a *et seq.* (1991); Conn. Agencies Regs. § 22a-66a-1 *et seq.* (1991); Fla. Admin. Code Ann. r. 10D-55.145 *et seq.* (1990); Ill. Rev. Stat. ch. 5, para. 851 *et seq.* (1989 Supp.); Ind. Admin. Code tit. 357, r. 1-5 *et seq.* (1990); Iowa Admin. Code r. 21-45.22 (206) *et seq.* (1990); Code of Maine Rules Vol. I, 01-026 ch. 22 § 1 *et seq.* (1990); Md. Regs. Code tit. 15, § 15.05.10.10 *et seq.* (1990); Minn. Stat. § 18B.01 *et seq.* (1990); N.H. Code Admin. R. Pes 508.01 *et seq.* (1990); N.J. Admin. Code tit. 7, § 7:30-9.11 *et seq.* (1990); N.Y. Envtl. Conserv. Law § 33-1001 *et seq.* (1990); 6 N.Y. Comp. Codes R. & Regs. tit. 6 § 325 *et seq.* (1987); 7 Pa. Code § 128.1 *et seq.* (1990); (1990); Lawn Care Rule T of the Rhode Island Pesticide Control Act, EVM-165-87, Department of Environmental Management (March 10, 1987); West Virginia Procedural Rule 61-12E, Department of Agriculture (Dec. 12, 1990); West Virginia Legislative Rule 61-12A, Department of Agriculture (Oct. 3, 1990).

and have been, achieved by the federal government and by states working within the two-tier FIFRA regulatory framework. Local ordinances simply are not needed to supplement the FIFRA regulatory scheme.[8]

B. FIFRA Preempts Local Ordinances Regulating Pesticide Use.

> "[T]he question whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.' " . . . To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.

Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S. Ct. 478, 482 (1990) (citations omitted). Here, the language, structure, and purpose of FIFRA reveal that Congress intended to preempt local ordinances regulating pesticides.[9]

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[8] This fact has been recognized by the National Association of State Departments of Agriculture ("NASDA"). A NASDA resolution adopted on September 19, 1984 states that FIFRA

> clearly establishes a federal-state partnership in the administration and enforcement of pesticide regulations. Such a two-party relationship currently exists and is working extremely well for our country. Recent efforts in many states by county, municipal, township and other local governments in considering local pesticide ordinances could threaten the historic federal-state relationship and create an unending hodge-podge of pesticide regulations which would totally destroy uniform pesticide regulation in the country.

[9] Petitioners cite the assumption against preemption of police powers in arguing that the Casey ordinance should be upheld. *See* Pet. Br., at 23-27. It is unclear whether the assumption applies here, since FIFRA does not preempt *state* police powers, but only *local* regulation beyond that imposed by states and the federal government. In any event, even when the assumption applies, preemption is compelled "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

1. Congress' Intent To Preempt Local Ordinances Regulating The Use Of Pesticides Is Evident From The Express Language Of FIFRA

Through FIFRA Congress created a comprehensive regulatory scheme governing pesticides. As an integral part of this scheme, it defined how regulatory authority is to be allocated. While Congress could have had the federal government occupy the field of pesticide regulation, it did not do so; instead, it vested some regulatory authority in the states. The statute thus provides: "A State may regulate the sale or use of any federal registered pesticide or device in the State . . . . " 7 U.S.C. § 136v(a).

"Savings" clauses, such as Section 136v(a), should be construed so as to avoid serious interference with comprehensive regulatory schemes. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987). Here, the fact that Congress saw fit to authorize *state* regulation of the sale and use of pesticides confirms its intent to create a comprehensive scheme in which authority to enact regulations is limited to the federal government and "States."[10] Section 136v(a) has meaning only if it is read as carving out from the federal domain and conferring upon "States" a specific sphere of authority over pesticides.[11] As such, the proper construction of "States" is

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[10] This type of analysis was applied in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273 (1989). In examining state liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), this Court noted 42 U.S.C. § 9607(d)(2), which provides a limited exemption of state and local government liability under CERCLA, and explained: "This section is, needless to say, an explicit recognition of the potential liability of States under this statute; Congress need not exempt States from liability unless they would otherwise be liable." 491 U.S. at ___, 109 S. Ct. at 2278-79. Here, Congress need not have authorized state regulation, through Section 136v(a), unless such regulation otherwise would have been preempted under FIFRA.

[11] The Solicitor General contends that Section 136v(a)'s authorization of *state* regulation, and omission to authorize *local* regulation, has no preemptive meaning. United States Br., at 9-10, 13-14. That conclusion

crucial to determining whether, as part of the comprehensive FIFRA scheme, Congress intended to preclude local regulation of pesticide use.

It is therefore highly significant that FIFRA defines "State" without including political subdivisions. The definition provides: "The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136(aa).

"It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987); *see Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979).[12] Because FIFRA's definition of "State" *excludes* local governments, the use of "State" in Section 136v(a) cannot be construed to *encompass* local governments. As such, Section 136v(a) clearly withholds regulatory authority from local governments, and evinces Congress' intent to preclude the regulation of pesticide use by local governments.

Other provisions of FIFRA, which expressly refer to political subdivisions or local authorities as distinct from states, reveal that Congress' exclusion of local regulatory authority was intentional. *See* 7 U.S.C. § 136f(b); *id.*

violates the rule of statutory construction that *all* language has independent meaning and purpose. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Moreover, that conclusion would mean that the congressional activity addressing whether local regulation should be authorized, *see* discussion *infra* at pp. 19-24, was an utterly empty exercise.

[12] *See also Philadelphia v. Stepan Chemical Co.*, 713 F. Supp. 1484, 1488 (E.D. Pa. 1989) ("CERCLA's definition of the term "state" does not include the word "municipality." The entities that are included - states, the District of Columbia, Puerto Rico, Guam, Samoa, the Virgin Islands, the Marianas, and United States territories and possessions - differ so vastly from villages, towns, boroughs, townships, counties, and cities as to be words of exclusion.").

§ 136r(b); *id.* § 136t(b).[13] Where, as here, " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted).

If "State" as used in FIFRA were intended to include local governments, then Congress' explicit references to political subdivisions, as separate from "States," would be unnecessary. That result would violate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). The references to "States" and political subdivisions as distinct entities make it clear that Congress differentiated between states and political subdivisions when it enacted FIFRA.

This is not a case, then, where preemptive intent is based upon statutory "silence." United States Br., at 10. Congress explicitly established a comprehensive scheme and explicitly gave "States," but not local governments, regulatory authority over pesticide use. Congress also explicitly distinguished between "States" and their political subdivisions, and when a limited role for political subdivisions was intended, the statute so provided. The language and structure of FIFRA plainly express an intent that local regulation of pesticide use be precluded.

[13] Section 136t(b) states that the EPA Administrator "shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations." *Amici* contend that this language reveals that local governments possess regulatory authority under FIFRA. Br. of States of Hawaii, *et al.*, at 11. The ability to assist "in securing uniformity of regulations" is a far cry from the ability to *enact* regulations in the first instance, however. Moreover, if Section 136t(b) reveals that local governments have an independent ability to enact pesticide regulations, then it necessarily also reveals independent regulatory authority by "any other Federal agency"—a result that is clearly contrary to Congress' intent to centralize regulatory authority in the EPA.

The arguments against this analysis are unavailing. For example, petitioners argue that the definition of "State" should not be read as excluding local governments because "Congress could have expressly excluded local governments from the definition simply by stating that the term 'does not include their political subdivisions' " but did not do so. Pet. Br., at 34-35. This argument is contrary to this Court's analysis of statutory definitions, and would require Congress to define not only what a term means but also what it does not. This Court should reject imposing such an absurd burden upon Congress.

Petitioners also contend that construing "State" to exclude local governments would yield an "absurd result" as applied to 7 U.S.C. § 136v(b), in that local governments would be permitted to regulate pesticide labeling and packaging when "States" cannot. Pet. Br., at 35-36. This "absurd result" is illusory because Section 136v(b) must be read in conjunction with Section 136v(a). Section 136v(a) authorizes state regulation of the "sale or use" of pesticides; Section 136v(b) then restricts that authorization by precluding state regulation of labeling and packaging. *See National Agricultural Chemicals Ass'n v. Rominger*, 500 F. Supp. 465, 470-71 (E.D. Cal. 1980) (7 U.S.C. § 136v "reveals both a broad grant of power to the states and a limitation on the exercise of that power."). This construction is confirmed by the use of "Such State" in Section 136v(b), which plainly refers to "State" as used in Section 136v(a). Because they are not "States," local governments are not authorized to regulate *any* aspect of the "sale or use" of pesticides, including "labeling or packaging".

The Solicitor notes FIFRA's definition of "States," but argues that "[b]ecause local governments are subordinate entities of the State itself, . . . this provision adds nothing to the analysis." United States Br., at 11. The significance of the definition cannot be so easily discounted, however. FIFRA's definition of "States" stands in sharp contrast to many federal statutes which define "State" to *include*

local subdivisions.[14] *See Ingersoll-Rand Co. v. McClendon*, ___ U.S. at___ , 111 S. Ct. at 484 (discussing Congress' varying definitions of "State" in ERISA). These statutes demonstrate that when Congress intends the word "State" to include local governments, it defines "State" accordingly. It thus is unreasonable to conclude that Congress—notwithstanding its own definition—intended the word "State" to include local governments for purposes of FIFRA.

The Solicitor General also argues that FIFRA's provisions which envision a limited role for local governments reflect an intent that local governments share in the regulatory authority afforded "States." United States Br., at 12 (citing 7 U.S.C. §§ 136f(b), 136u(a)(1)). This assertion is unpersuasive. Section 136f(b) vests authority to inspect records in "any State *or* political subdivision" and reveals that Congress viewed those entities as separate; the inspection authority given local governments by Section 136f(b) thus does not equate with the general enforcement authority which Section 136u(a)(1) gives *only* to "States." Moreover, as the Solicitor recognizes, United States Br., at 12, both Section 136f(b) and Section 136u(a)(1) deal with *enforcement* of regulations, and thus are irrelevant to ascertaining authority to *enact* regulations. Simply put, Congress *was* willing to permit local governments a limited role in assisting in *enforcement* of federal and state regulations; it *was not* willing to yield to local governments the fundamentally distinct power to *enact* such regulations.

The Solicitor also cites 7 U.S.C. § 136i(a)(2)(A) in arguing that while Congress intended state-wide administration of applicator certification plans, it did not provide for state-wide administration of pesticide use regulation.

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[14] For example, 15 U.S.C. § 1692a(8) defines "State" as "any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing." *See also* 10 U.S.C. § 2232(1); 15 U.S.C. § 1693a(10); *id.* § 3316(b)(2)(c)(i); 25 U.S.C. § 1742(2); *id.* § 1772a(2); 27 U.S.C. § 214(10); 29 U.S.C. § 1144(c)(2); 30 U.S.C. § 552; 42 U.S.C. § 4601(2).

United States Br., at 13. This argument proves nothing because the authority to "administer" regulations is entirely different from the authority to enact regulations.

Section 136i(a)(2) is worth noting, however, because in 1975 the EPA promulgated regulations pursuant to that section. *See* 40 Fed. Reg. 11,698 (1975). One proposed provision stated: "In the event that more than one State agency will be responsible for performing certain functions under the State plan, the plan shall identify which functions are to be performed by which agency and indicate how the program will be coordinated by the lead agency to ensure consistency of programs within the State." *Id.* at 2531. The EPA later substituted "governmental agency" for "State agency," and explained:

> This change is made only to accommodate a State needing the assistance of local authorities in implementing and maintaining its certification programs, and provided that such assistance is uniform throughout the State and is totally responsive to State direction. *It is not the intention of the Act or these regulations to authorize political subdivisions below the State level to further regulate pesticides.*

40 Fed. Reg. at 11,700 (emphasis added).

The Solicitor contends that this EPA statement relates only to applicator certification matters. United States Br., at 22 n.20. That contention is belied by the language of the passage; the phrase "further regulate pesticides" clearly refers to regulation beyond the certification context. The Solicitor also states that "[t]o the extent that the EPA statement . . . is subject to a broader reading, the language could have been more precise; EPA's position is that local governments are not preempted from regulating pesticide use." *Id.* The 1975 EPA statement was not imprecise, however; it clearly articulated a position that local regulation of pesticide use was preempted by FIFRA. The EPA thus has not clarified an "imprecise" position, it has changed its position entirely. That change evidently was adopted in response to this case, and it is

not entitled to the deference of this Court because it is "wholly unsupported by regulations, rulings, or administrative practice" and is contrary to the EPA's prior position. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). "[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983).

In summary, within FIFRA's comprehensive framework, Congress intended to permit regulation of pesticide use by the federal government and the states, but not by local governments. The language and structure of FIFRA thus demonstrate Congress' intent to preempt regulation of pesticide use by local governments.

2. The Legislative History Of FIFRA Confirms That Congress Intended To Preempt Local Ordinances Regulating The Use Of Pesticides.

The legislative history of the 1972 amendments to FIFRA begins with a presidential proposal introduced in the House of Representatives on February 10, 1971. *See* H.R. Rep. No. 511, 92d Cong., 1st Sess. at 12 (1971). The bill stated, *inter alia*: "nothing in this Act shall be construed as limiting the authority of a State or a political subdivision to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." The bill was assigned to the House Agriculture Committee, which held 17 public hearings, *id.* at 13, and reported a new bill, H.R. 10729, to the full House. *Id.* at 1.

H.R. 10729 deleted any reference to political subdivisions in the section authorizing states to regulate the sale or use of pesticides, and provided instead:

> A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act or restrict by license or permit the use of a pesticide registered for general use.

H.R. Rep. No. 511, *supra*, at 64. The Committee Report explained: "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." *Id.* at 16. H.R. 10729 then passed the full House by a vote of 288-91. *See* 117 Cong. Rec. H10773-74 (daily ed. Nov. 9, 1971).

In the Senate, H.R. 10729 was referred to the Committee on Agriculture and Forestry. That Committee's Report stated:

> The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the 50 States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.* (emphasis added)

S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008.

H.R. 10729 was then referred to the Commerce Committee, which approved an amendment expressly authorizing local regulation of the sale or use of pesticides. The Committee Report stated:

> While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that Committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA.

S. Rep. No. 970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4092, 4111.[18]

Following an exchange of letters between the chairmen of the two Senate committees, it was agreed that the staffs of the two committees would confer. *See* 1972 U.S. Code Cong. & Admin. News at 4086-88. After weeks of meetings, a "Compromise Amendment in the Nature of a Substitute" was prepared. *Id.* at 4088-91. The compromise, which did *not* contain the provision authorizing local regulation, was agreed to by a majority of the Commerce Committee and by all members of the Agriculture and Forestry Committee. *See id.*; 118 Cong. Rec. S15889 (statement of Sen. Allen) (daily ed. Sept. 26, 1972).

On the Senate floor, the Commerce Committee amendments, including the provision authorizing local regulation, were offered. *See* 118 Cong. Rec. S15888 (daily ed. Sept. 26, 1972). Senator Talmadge, chairman of the Committee on Agriculture and Forestry, and Senator Allen, chairman of a key subcommittee, then offered the compromise as a substitute. *See id.* at S15888-89. With unanimous consent, Senator Allen inserted in the *Congressional Record* an ex-

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[18] The Agriculture and Forestry Committee then filed a Supplemental Report reaffirming the Agriculture Committee's conclusion "that regulation by the Federal government and the 50 States should be sufficient and should preempt the field." *See* 1972 U.S. Code Cong. & Admin. News at 4023, 4026; *see also id.* at 4066.

cerpt from S. Rep. No. 838, which included the statement that the legislation "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at S15893. Senator Allen also submitted an "explanation of compromise substitute for the text of H.R. 10729," which made it clear that the Commerce Committee's amendment to grant local governments the authority to regulate pesticides had *not* been included in the compromise. *Id.* at S15895 ("Commerce Committee amendment[ ] . . . 10 (authority of local governments to regulate the use of pesticides) . . . [is] not included in the substitute."). The Senate approved the compromise by a vote of 71-0. *Id.* at S15900.

House and Senate members then met in conference to resolve the differences between the Senate and House bills. Since both bills were expressly understood to preclude local regulation of pesticides, that issue was not mentioned in the joint explanatory statement of the conference committee, *see* H. Con. Rep. 1540, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4130, or in the Senate Agriculture and Forestry Committee's statement on "differences between the Senate amendment to H.R. 10729 and the conference substitute therefor." 118 Cong. Rec. S16977-78 (daily ed. Oct. 5, 1972). Both Houses then approved the conference report. *Id.* at S16981; *id.* at H9798 (daily ed. Oct. 12, 1972).

This history affirms Congress' intent that FIFRA preclude local regulation of pesticide use. The rejection of the President's bill and the Commerce Committee's amendment, both of which included language expressly authorizing local regulation, "reveals a conscious decision by Congress" to eliminate such language. *Tennessee Valley Authority v. Hill*, 437 U.S. 15[illegible]185 (1978); *see also Russello v. United States*, 464 U.S[illegible]t 23-24. In addition, the operative committee reports—those of the House Agriculture Committee and the Senate Committee on Agriculture and Forestry—explicitly reject local regulation. These reports are "the authoritative source for finding the Legislature's intent," *Garcia v. United States*, 469 U.S. 70, 76 (1984), which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969).[16]

The Solicitor argues that it is "entirely plausible" to conclude that the Senate committees "agreed to disagree on the issue of preemption of local regulation." United States Br., at 19. Such a reading is belied by the facts: the Agriculture Committee version of the relevant provision was accepted; the Commerce Committee amendment authorizing local regulation was rejected; the full Senate was advised of that fact; and the Agriculture Committee's interpretation of the language as preempting local regulation was inserted in the *Congressional Record*. The disagreements between the two committees were not left unresolved, they were resolved in favor of the preemption position of the Senate Agriculture and Forestry Committee.

The concurring opinion in *Professional Lawn Care Ass'n v. Milford* aptly summarizes the analysis:

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[16] *Amici* argue that the history is not clear because three cases have found that the history does not support preemption. NIMLO Br., at 7. It is worth noting, however, that two of the cases cited—*COPARR, Ltd. v. Boulder*, 735 F. Supp. 363 (D. Colo. 1989), and *Central Maine Power Co. v. Lebanon*, 571 A.2d 1189 (Me. 1990)—simply adopt the analysis of the third case, *People, ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). That analysis, moreover, is riddled with errors: it ignored the rule that a statutory definition of a term necessarily excludes unstated meanings of that term; it ignored the provisions of FIFRA which distinguish between "States" and local governments; it ignored the rejections of language which would have authorized local regulation; and it downplayed the significance of the relevant committee reports. Not surprisingly, two federal courts have concluded that *County of Mendocino* is " 'based on an untenable reading of the legislative record.' " *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d at 934 (quoting *County of Mendocino*, 204 Cal. Rptr. at 911, 683 P.2d at 1164 (Kaus, J., dissenting)); *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. at 111 n.2.

> The appellants in this case argue that because the dispute over preemption of local regulatory authority was compromised by not specifically referring to this subject in the statute, the compromise was not designed to preempt traditional local police powers or to preempt the power of a state to distribute its regulatory authority between itself and its political subdivisions in any way it might see fit. . . . The argument might have been persuasive if the compromise had been limited to the local government issue, but such was not the case. There were numerous points of disagreement between the Senate committees, for example, and the compromise reached in the Senate was based on the Agriculture Committee's receding on some issues and the Commerce Committee's receding on others. The local government question was one on which the Commerce Committee gave way to the Agriculture Committee entirely, and when the Senate passed the compromise bill, it passed a bill that the [Agriculture] Committee had said, in its June 7 report, "should be understood as depriving . . . local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."

909 F.2d at 939-40 (Nelson, J., concurring) (citation omitted).[17]

3. Congress' Decision to Preclude Local Regulation Was Based Upon Sound Legislative Judgments.

In the 1972 amendments to FIFRA Congress considered the question of local regulation of pesticide use, determined

[17] In any event, a dispute in the Senate cannot affect the position of the House as to *its* version of legislation, and here the preemptive intent of the House is stated plainly in the Report of the House Agriculture Committee. As one court recently noted, "[i]f the Senate and House histories conflict, the history of the body in which the enacted bill originated is normally more persuasive." *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 210 (1990); *see also Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).

that such regulation should be precluded, and wrote the statute to reflect that decision. Congress had sound policy reasons for making such a judgment, and its purpose is relevant to the preemption analysis. *Ingersoll-Rand v. McClendon*, ___ U.S. at ___, 111 S. Ct. at 482.

The prevailing committee reports on the 1972 amendments concluded that regulation of pesticide use by local governments should be precluded for three reasons. First, the states and the federal government provide an adequate number of regulatory jurisdictions. Second, only the federal government and states have the resources and expertise to properly regulate the sale and use of pesticides. Third, the balkanization resulting from local regulation of pesticide use would constitute an extreme burden on interstate commerce. *See* H.R. Rep. No. 511, *supra*, at 16; S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008.

The policy considerations underlying Congress' decision have been realized by the current state of pesticide regulation in the United States. Local regulation of pesticides is not necessary; as was discussed *supra*, the federal government and the states have extensively regulated pesticide use and have put into effect the same types of regulation now attempted by local governments. To the extent that local governments believe that additional regulation is needed, they can achieve such regulation through the states, within the FIFRA two-tier regulatory framework.

Congress also accurately foresaw that local governments would lack the expertise to properly regulate pesticides. Local regulations already have been imposed without benefit of the expertise necessary to regulate in a specialized area. The regulations at issue in *People, ex rel. Deukmejian v. County of Mendocino*, *supra*, and in *Central Maine Power Co. v. Lebanon*, *supra*, highlight that fact. In *County of Mendocino*, the "regulation" was an outright ban on aerial application of certain herbicides, imposed by an initiative approved by county voters. In *Lebanon*, the ordinance per-

mits the application of pesticides only if residents approve the application by a "Town Meeting" vote. Neither ordinance makes any pretense of basing pesticide regulation on regulatory expertise or scientific analysis.

Congress also correctly realized that local regulation of pesticides would be unduly burdensome. The local ordinances described above, which impose a welter of different prohibitions, permit and license criteria, posting and notice requirements, and penalties, have resulted in a patchwork quilt of regulation which creates substantial, and unnecessary, costs. If local regulation is permitted, the lack of uniformity and unnecessary cost will increase. Commercial applicators will be obligated to comply with the regulations of thousands of jurisdictions, each imposing varying duties, obligations, and placard criteria. As the Sixth Circuit found, allowing local regulation of pesticide use "would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations." *Professional Lawn Care Ass'n v. Milford*, 909 F.2d at 934.

In short, permitting local regulation would seriously undermine the policy decisions underlying the FIFRA regulatory framework. In that sense, this case is analogous to *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *Ouellette*, this Court considered whether, under the comprehensive regulatory scheme created by the Clean Water Act, non-source states affected by pollution could regulate pollution sources. The Act expressly vested regulatory authority in the federal government and in source states, but also included a "savings clause" allowing additional regulation. Respondents invoked that clause in seeking to apply Vermont nuisance law to a source located in New York. *Id.* at 483-87.

This Court held Vermont law preempted, finding that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress." 479

U.S. at 493-94. The Court noted that permitting application of the laws of a non-source state would disrupt the "balance of interests" established by the comprehensive federal scheme, and would subject sources to a variety of different, and often vague, rules of conduct. *Id.* at 495-96. In view of these circumstances, this Court concluded:

> It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure.
>
> Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

Id. at 497.

In *Ouellette*, as here, the federal statute established a comprehensive "regulatory 'partnership'" between the federal government and the states. There, as here, another layer of regulation was sought to be imposed. There, as here, permitting such regulation would create "a chaotic regulatory structure" contrary to Congress' purpose in creating a comprehensive scheme.

This Court should follow the *Ouellette* analysis and reject local regulation of pesticide use. Congress had sound reasons for precluding such regulation, and it crafted FIFRA to achieve that goal. Due respect for congressional intent, and congressional efforts, requires a holding that FIFRA preempts local regulation of pesticide use.

4. Preemption of Local Regulation Does Not Impair Fundamental Principles of Federalism.

Petitioners contend that construing FIFRA to preclude local regulation of pesticide use would violate "fundamental principles of federalism" embodied in the Tenth Amendment. Pet. Br., at 90-101. This argument should be rejected. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court held that Congress has the power to control the states in areas considered to be traditional state functions. Congress may prohibit the states from delegating to local governments the power to regulate, particularly where, as here, it concluded that uniform regulation was essential and that local governments could not adequately regulate in a given field.

Even if *Garcia* were to be reconsidered, this case is not the proper vehicle to do so.[18] FIFRA does not regulate states, it regulates private individuals and businesses. The Tenth Amendment does not prohibit Congress "from displacing state police power laws regulating private conduct." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981).

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[18] While petitioners complain that preemption of local ordinances will prevent a state from delegating its power under FIFRA to local governments, that circumstance does not exist here. Petitioners have not cited any statute delegating Wisconsin's power under FIFRA to local governments; indeed, Wisconsin has enacted state-wide regulation of pesticide use. *See* Wis. Stat. §§ 94.67 - 94.71. Casey claims the power to regulate pursuant to a 1921 statute which gives Wisconsin municipalities "all the powers that the legislature could by any possibility confer upon" them. Pet. Br., at 95-96 n.33. This general grant does not constitute a delegation of FIFRA regulatory authority from Wisconsin to Casey, nor does it mean that Casey was acting with the power of the state when it enacted its ordinance. *See Community Communications Co., Inc. v. Boulder*, 455 U.S. 40, 54-56 (1982). Since Wisconsin has not delegated its authority under FIFRA to local governments, any federalism argument necessarily is based upon speculation. Essentially, petitioners ask this Court to render the kind of advisory opinion that has long been held inconsistent with the requirements of Article III of the Constitution; this Court should decline to do so.

> Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."

National League of Cities v. Usery, 426 U.S. 833, 840 (1976) (citations omitted).

Second, FIFRA does not impair state autonomy, nor does it command that states take any affirmative acts. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288. Rather, FIFRA *permits* states to enact pesticide use regulations, and it *permits* states to delegate some or all of the authority to achieve *enforcement* of those regulations to local governments. The only prohibition effected by the statute is the prohibition of *enactment* of pesticide use regulations by local governments.

Congress clearly has the power to regulate pesticide use and to require regulatory uniformity. It also is beyond dispute that Congress has the power to prohibit *all* state and local regulation of pesticides. Here, Congress exercised its power in a narrower fashion, by permitting federal and state regulation while prohibiting additional, non-uniform regulation by thousands of units of local government. That decision does not violate the Tenth Amendment.[19]

The assertions of petitioners and *amici*, if accepted by this Court, would place a curious restriction on congres-

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[19] *See Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 765 (1982) ("Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme . . . ."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 290 ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

sional power. In areas where Congress concluded that uniformity of regulation was needed to avoid burdens on commerce, but recognized that local conditions might make additional state-wide regulation advisable, it could not enact legislation which would achieve both goals. Rather, it would be forced either to forgo its first goal, and allow the burdens on commerce caused by extensive non-uniform regulation, or to forgo its second goal, and preempt all other regulation in the area despite its conclusion that additional regulation at the state level would be salutary.

As the Solicitor General has noted, such an approach "stands the Tenth Amendment on its head." United States Br., at 24 n.21. Petitioners' argument that principles of federalism are violated by preemption of local ordinances regulating pesticide use is without foundation and should be rejected by this Court.

III. CONCLUSION

The comprehensive regulatory framework created by FIFRA, the plain language of the statute, and its legislative history all compel the conclusion that FIFRA preempts local regulation of pesticides. The decision of the Wisconsin Supreme Court should be affirmed by this Court.

Respectfully submitted,

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